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# Re Goh Kiang Ann; ex parte: OCBC Bank (M) Bhd

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HIGH COURT (SIBU) — BANKRUPTCY PROCEEDINGS NO SBW-29NCC-62–8 OF 2023
WONG SIONG TUNG J
17 DECEMBER 2024

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*Bankruptcy — Bankruptcy notice — Leave — Whether issuance of bankruptcy notice constituted to commencement of a bankruptcy action — Whether judgment creditor must obtain prior leave from court before issuing a bankruptcy notice against judgment debtor who was a guarantor — Whether judgment creditor exhausted all modes of execution and enforcement to recover debts owed by principal debtor or borrower — Insolvency Act 1967 s 5(3) — Bankruptcy (Amendment) Act 2017*

D

*Words and Phrases — Bankruptcy action — Bankruptcy (Amendment) Act 2017 — Whether 'bankruptcy action' encompassed a broader scope than merely a 'bankruptcy petition' — Whether issuance of bankruptcy notice constituted commencement of bankruptcy action — Whether prior leave of court required*

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The judgment creditor ('JC') obtained the issuance of a bankruptcy notice ('BN') against the judgment debtor ('JD') based on a judgment. The judgment was against the JD and two other defendants, who were guarantors for debts owed by Episo Enterprise Sdn Bhd ('Episo') under banking facilities provided by the JC. The JC then filed a summons in chambers seeking leave to commence bankruptcy action against the JD under s 5(3)(b) of the Insolvency Act 1967. This application was contested by the JD. Meanwhile, the validity period for service of the BN was extended by the SAR under r 94 of the Insolvency Rules 2017 ('the IR') and the JC's application, giving the JC leave to commence bankruptcy proceedings against the JD was also granted. Dissatisfied, the JD appealed the SAR's decision. Following that, the JC served JD with the BN resulting the JD to file an application to set aside the BN, which was subsequently dismissed by the senior assistant registrar ('SAR'). Hence, the present appeal by the JD on the grounds, inter alia, that: (a) the floating base lending rate ('BLR') used to calculate the interest in the BN was not in accordance with the terms of the judgment; (b) the BN was improperly issued separately against the JD, despite the joint and several liabilities of the three guarantors; (c) the BN was issued before the JC obtained leave from the court, under s 5(3)(b) of the Insolvency Act 1967 ('the IA'), to commence bankruptcy action against the JD; (d) the extension of time to serve the BN on the JD was granted without the JC establishing special circumstances or good

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cause as required under r 283 of the IR; and (e) the judgment was defective as it lacked essential details, such as the identity of the judge and the process of which the decision was made. The issues that arose for determination were: (i) whether the BN was valid if it was issued before the JC obtained leave from the court under s 5(3)(b) of the Insolvency Act 1967; (ii) whether the BLR used to calculate the interest in the BN was not in accordance with the terms of the judgment; and (iii) whether the BN was improperly issued solely against the JD, despite the joint and several liabilities of the three guarantors.

**Held**, allowing the appeal with no order as to costs:

(1) The purpose of introducing the amendments under Bankruptcy (Amendment) Act 2017 ('Act A1534') which replaced s 5(3) of the previous Act by s 12(b) of Act A1534, with the current provisions under s 5(3)(a) and (b) of the IA, indicated a clear legislative intention that leave must now be obtained prior to commencing a bankruptcy action. By deliberately retaining the phrase 'bankruptcy action' in s 5(3), despite revising and defining 'bankruptcy petition' exhaustively in s 2, the Legislature appeared to have intended 'bankruptcy action' to encompass a broader scope than merely a 'bankruptcy petition'. This distinction showed that the Legislature intended that 'bankruptcy action' was meant to include not only a creditor's petition or a debtor's petition for bankruptcy, but also other proceedings, steps, or actions connected to the broader bankruptcy process. To interpret 'bankruptcy action' narrowly as synonymous with 'bankruptcy petition' in the light of the amendments introduced by Act A1534 would render the legislative choice and intent to retain the former term redundant or purposeless (see paras 36, 39 & 41).

(2) In view of the amendments introduced by Act A1534, particularly to the definition of 'bankruptcy petition' as confined to only a creditor's petition or a debtor's petition for bankruptcy under s 2 of the Insolvency Act 1967, the phrase 'bankruptcy action' in s 5(3) of the IA could no longer be construed synonymously with creditor petition. With the amendments introduced by Act A1534, the issuance of the bankruptcy notice constitutes commencement of bankruptcy action and for the issuance of which against a debtor who was a guarantor (other than a social guarantor) under s 5(3) of the Insolvency Act 1967, prior leave of the court was required. Since the JC had not exhausted all modes of execution and enforcement to recover debts owed by Episo, the principal debtor or borrower, and given that the SAR's order granting leave to the JC had been set aside upon appeal by the JD and in light of the court's decision, the JD's appeal was allowed (see paras 49 & 54–55).

(3) By the judgment, the court could not have intended to create a fixed rate by referencing the base lending rate. Rather, it reflected a fluctuating rate

tied to the Bank Negara's policy, which could change over time. The judgment's use of and reference to the term 'base lending rate,' in context, coupled with the monthly rest calculation method, demonstrated an intention for the rate to remain subject to periodic changes. This was consistent with the established understanding of the term and the operational practices of financial institutions. Therefore, the rate of 5.76%pa as specified in the judgment was not intended to be fixed. Instead, it represented the base lending rate being calculated in anticipation of future fluctuations as may be required by the Bank Negara. Hence, it could not be said that the judgment sums demanded by the JC in the BN were not calculated in accordance with the terms of the judgment (see paras 72–75).

(4) The judgment in this case orders each of the guarantors (the first, second, and third defendants), including the JD as the third defendant, to jointly and severally pay the judgment sums. Under joint and several liability, while the JC can pursue against one or all of the guarantors (including the JD as the third defendant) under the judgment obtained, the JC could not recover more than the total amount of the judgment sums. The recovery was strictly limited to the total amount of the judgment sums and owed. However, there was no evidence or allegation that either of the other guarantors (the first and second defendants) had made any payment towards the judgment sums to the JC. Therefore, there be no issue of double or triple recovery (see paras 78 & 81–82).

(5) The JD was not required to procure the issuance of the BN against all three guarantors (including the JD as the third defendant) collectively under the judgment. The JC was entitled to procure the issuance of the BN separately against each of them individually, though it could not recover more than the total judgment sums collectively owed by all of them. The issuance of the BN separately against each of them individually did not mean that the JC was claiming the judgment sums due and owing three times as contended by learned counsel for the JD. Accordingly, the JD's appeal on this ground could not be sustained (see paras 84–87).

(6) A delay in serving the BN did not render it invalid. Notably, there was no application to set aside these extension orders. Therefore, this appeal did not pertain to any application challenging the extension orders made by the SAR. Instead, it concerned the JD's application to set aside the BN, which was dismissed by the SAR. The orders extending the validity period for the service of the BN, though made by the SAR, were binding court orders and remain valid until set aside. As long as these orders stand, it was not opened to the JD to argue that the JC failed to demonstrate before the SAR, special circumstances or good cause in their applications for an extension of time (see paras 90 & 92–94).

(7) It was also not open to the JD to challenge the validity of these orders in this appeal. Such a challenge amounted to a collateral attack on the validity of the court orders extending the time for service of the BN. The validity of these orders could only be challenged through proceedings specifically instituted for that purpose and not collaterally in this appeal. Additionally, s 93(4) of the IA, read together with rr 283 and 94 of the IR, empowered the court with the discretion to extend the validity period for the service of the BN beyond the initial three months from the date of its issuance. Considering the time involved in the disposal of the JC's application for leave to commence bankruptcy proceedings and in the JD's appeal against the SAR's decision in granting leave, there were materials before the SAR to justify the exercise of discretionary power to extend the validity period for the service of the BN (see paras 96–98).

(8) While O 45 r 5(3) of the Rules of Court 2012 stipulates that an order shall bear the name of the judge, magistrate, or registrar who made it, O 45 r 5(1) provides for different forms in respect of judgments, some provide for name of the judge to be stated, depending on the nature of the matter. The applicable form of judgment under O 42 r 5(a) of the Rules of Court 2012 appears to be Form 75(l), which applies to judgments entered pursuant to a court order made for judgment to be entered. This prescribed form of judgment did not require the name of the judge who made the order to be stated, similar to judgments entered in default of appearance or defence. It was, therefore, incomprehensible how the judgment could be inconsistent with the court order. The contention on behalf of the JD in this ground of appeal was entirely without merit. It was a futile and excessive effort to search for problems in the judgment entered by the High Court pursuant to the order, where none exist (see paras 105–106 & 108–109).

**[Bahasa Malaysia summary**

Pemiutang penghakiman ('JC') telah memperoleh pengeluaran notis kebankrapan ('NK') terhadap penghutang penghakiman ('JD') berdasarkan satu penghakiman. Penghakiman tersebut adalah terhadap JD dan dua defendan lain selaku penjamin bagi hutang-hutang yang ditanggung oleh Episo Enterprise Sdn Bhd ('Episo') di bawah kemudahan perbankan yang diberikan oleh JC. JC kemudiannya memfailkan satu saman dalam kamar untuk mendapatkan kebenaran bagi memulakan tindakan kebankrapan terhadap JD menurut s 5(3)(b) Akta Kebankrapan 1967. Permohonan ini telah dibantah oleh JD. Dalam masa yang sama, tempoh sah penyampaian BN telah dilanjutkan oleh penolong kanan pendaftar Mahkamah Tinggi ('PKP') menurut k 94 Kaedah-Kaedah Insolvensi 2017 ('KKI'), dan permohonan JC untuk memulakan prosiding kebankrapan terhadap JD telah dibenarkan. Tidak berpuas hati, JD telah memfailkan rayuan terhadap keputusan SAR. Seterusnya, JC menyampaikan JD dengan NK yang mana JD kemudiannya

memfailkan permohonan untuk mengetepikan NK tersebut, yang kemudiannya telah ditolak oleh SAR. Oleh itu, rayuan semasa telah difailkan oleh JD atas alasan, antara lain bahawa: (a) kadar pinjaman asas terapung ('BLR') yang digunakan untuk mengira faedah dalam BN tidak selaras dengan terma penghakiman; (b) NK telah secara tidak teratur dikeluarkan secara berasingan terhadap JD walaupun terdapat liabiliti bersama dan berasingan oleh ketiga-tiga penjamin; (c) NK telah dikeluarkan sebelum JC memperoleh kebenaran mahkamah di bawah s 5(3)(b) Akta Kebankrapan 1967, untuk memulakan tindakan kebankrapan terhadap JD; (d) lanjutan masa untuk penyampaian NK kepada JD telah diberikan tanpa JC membuktikan keadaan luar biasa atau sebab munasabah seperti yang dikehendaki di bawah k 283 KKI; dan (e) penghakiman adalah cacat kerana tidak mengandungi butiran penting seperti identiti hakim dan proses pembuatan keputusan. Isu-isu yang perlu diputuskan adalah: (i) sama ada NK adalah sah sekiranya ia dikeluarkan sebelum JC memperoleh kebenaran mahkamah di bawah s 5(3)(b) Akta Kebankrapan 1967; (ii) sama ada kadar BLR yang digunakan untuk pengiraan faedah dalam NK tidak selaras dengan terma penghakiman; dan (iii) sama ada NK telah dikeluarkan secara tidak wajar hanya terhadap JD, walaupun wujud liabiliti bersama dan berasingan antara ketiga-tiga penjamin.

**Diputuskan**, membenarkan rayuan tanpa sebarang perintah mengenai kos:

(1) Tujuan pengemukaan pindaan melalui Akta (Pindaan) Kebankrapan 2017 ('Akta A1534') yang menggantikan s 5(3) terdahulu dengan s 5(3)(a) dan (b) yang baharu dengan peruntukan semasa di bawah s 5(3)(a) dan (b) AK, menunjukkan niat jelas perundangan bahawa kebenaran mesti diperoleh sebelum memulakan tindakan kebankrapan. Dengan secara sengaja menegekalkan istilah 'tindakan kebankrapan' dalam s 5(3) meskipun 'petisyen kebankrapan' telah dipinda dan ditakrif secara menyeluruh dalam s 2, penggubal undang-undang kelihatan berniat agar istilah 'tindakan kebankrapan' merangkumi skop yang lebih luas daripada sekadar 'petisyen kebankrapan'. Perbezaan ini menunjukkan bahawa penggubal undang-undang berhasrat agar 'tindakan kebankrapan' tidak hanya terhad kepada petisyen kebankrapan oleh pemiutang atau penghutang, tetapi turut merangkumi segala prosiding, langkah atau tindakan lain yang berkait rapat dengan proses kebankrapan secara menyeluruh. Sekiranya 'tindakan kebankrapan' ditafsirkan secara sempit sebagai sinonim kepada 'petisyen kebankrapan' dalam konteks pindaan yang diperkenalkan melalui Akta A1534, ia akan menjadikan pilihan dan niat perundangan untuk mengekalkan istilah tersebut sebagai sia-sia dan tanpa tujuan (lihat perenggan 36, 39 & 41).

(2) Memandangkan pindaan yang diperkenalkan melalui Akta A1534, khususnya terhadap takrifan 'petisyen kebankrapan' yang kini dihadkan hanya kepada petisyen kebankrapan oleh pemiutang atau oleh penghutang di bawah s 2 Akta Insolvensi 1967, frasa 'tindakan

kebankrapan' dalam s 5(3) AI tidak lagi boleh ditafsirkan secara sinonim dengan petisyen pemiutang. Dengan pindaan yang diperkenalkan oleh Akta A1534, pengeluaran notis kebankrapan kini membentuk permulaan suatu tindakan kebankrapan dan bagi maksud pengeluarannya terhadap seseorang penghutang yang bertindak sebagai penjamin (selain daripada penjamin sosial) di bawah s 5(3) Akta Insolvensi 1967, dengan kebenaran terdahulu daripada mahkamah adalah diperlukan. Oleh kerana JC belum melaksanakan sepenuhnya segala kaedah pelaksanaan dan penguatkuasaan untuk mendapatkan kembali hutang yang tertunggak oleh Episo selaku penghutang utama atau peminjam, dan memandangkan perintah SAR yang membenaran kebenaran kepada JC telah diketepikan melalui rayuan oleh JD, serta mengambil kira keputusan mahkamah, maka rayuan oleh JD telah dibenarkan (lihat perenggan 49 & 54–55).

(3) Berdasarkan penghakiman, mahkamah tidak berniat untuk membuat kadar tetap dengan merujuk istilah 'base lending rate'. Sebaliknya, kadar itu berkait rapat dengan dasar Bank Negara, yang berubah dari semasa ke semasa. Penggunaan dan rujukan kepada istilah 'base lending rate' dalam konteks penghakiman tersebut, yang digabungkan dengan kaedah pengiraan secara 'monthly rest', menunjukkan niat agar kadar tersebut kekal tertakluk kepada perubahan berkala. Ini adalah selaras dengan pengertian yang telah diterima umum bagi istilah tersebut dan amalan operasi institusi kewangan. Oleh itu, kadar 5.76% setahun seperti yang dinyatakan dalam penghakiman tidaklah dimaksudkan sebagai kadar tetap. Sebaliknya, ia merupakan kadar BLR yang dikira dengan mengambil kira jangkaan perubahan kadar pada masa hadapan sebagaimana yang mungkin dikehendaki oleh Bank Negara. Maka, tidak boleh dikatakan bahawa jumlah penghakiman yang dituntut oleh JC dalam NK tersebut tidak dikira mengikut terma-terma yang telah ditetapkan dalam penghakiman (lihat perenggan 72–75).

(4) Penghakiman dalam kes ini memerintahkan setiap penjamin (defendan pertama, kedua, dan ketiga), termasuk JD sebagai defendan ketiga, secara bersama dan berasingan membayar jumlah penghakiman. Di bawah liabiliti bersama dan beberapa, meskipun JC boleh meneruskan terhadap satu atau semua penjamin (termasuk JD sebagai defendan ketiga) di bawah penghakiman yang diperoleh, JC tidak boleh mendapatkan semula lebih daripada jumlah keseluruhan jumlah penghakiman. Pengambilan semula adalah terhad kepada jumlah keseluruhan jumlah penghakiman dan terhutang. Walau bagaimanapun, tiada keterangan atau dakwaan bahawa salah satu daripada penjamin lain (defendan pertama dan kedua) telah membuat sebarang pembayaran terhadap jumlah penghakiman kepada JC. Oleh itu, tiada isu pengambilan semula dua kali ganda atau tiga kali ganda (lihat perenggan 78 & 81–82).

(5) JD tidak diperlukan untuk mendapatkan pengeluaran BN terhadap ketiga-tiga penjamin (termasuk JD sebagai defendan ketiga) secara kolektif di bawah penghakiman. JC berhak mendapatkan pengeluaran NK secara berasingan terhadap setiap daripada mereka secara individu, walaupun ia tidak boleh mendapatkan lebih daripada jumlah penghakiman yang terhutang secara kolektif oleh mereka semua. Pengeluaran NK secara berasingan terhadap setiap daripada mereka secara individu tidak bermakna JC menuntut jumlah penghakiman yang perlu dibayar dan terhutang sebanyak tiga kali seperti yang dipertikaikan oleh peguamcara yang bijaksana untuk JD. Sehubungan itu, rayuan JD atas alasan ini tidak dapat dipertahankan (lihat perenggan 84–87).

(6) Kelewatan penyampaian NK tidak menjadikannya tidak sah. Terutama, tiada permohonan untuk mengetepikan perintah lanjutan ini. Oleh itu, rayuan ini tidak berkaitan dengan mana-mana permohonan yang mencabar perintah lanjutan yang dibuat oleh SAR. Sebaliknya, ia melibatkan permohonan JD untuk mengetepikan BN, yang ditolak oleh SAR. Perintah melanjutkan tempoh sah perkhidmatan BN, walaupun dibuat oleh SAR, adalah mengikat perintah mahkamah dan kekal sah sehingga diketepikan. Selagi perintah ini berkuat kuasa, ia tidak dibuka kepada JD untuk berhujah bahawa JC gagal untuk menunjukkan di hadapan SAR, keadaan khas atau sebab yang baik dalam permohonan mereka untuk lanjutan masa. (lihat perenggan 90 & 92–94).

(7) Ia juga tidak terbuka kepada JD untuk mencabar kesahihan perintah ini dalam rayuan ini. Cabaran sedemikian adalah serangan cagaran terhadap kesahihan perintah mahkamah yang memanjangkan masa penyampaian BN. Kesahihan perintah ini hanya boleh dicabar melalui prosiding yang dimulakan khusus untuk tujuan itu dan bukan secara cagaran dalam rayuan ini. Selain itu, s 93(4) AI, dibaca bersama rr 283 dan 94 KKI, memberi kuasa kepada mahkamah dengan budi bicara untuk melanjutkan tempoh sah penyampaian BN melebihi tiga bulan awal dari tarikh ia dikeluarkan. Memandangkan masa yang terlibat dalam pelupusan permohonan kebenaran JC untuk memulakan prosiding kebankrapan dan dalam rayuan JD terhadap keputusan SAR dalam memberikan kebenaran, terdapat bahan sebelum SAR untuk mewajarkan pelaksanaan kuasa budi bicara untuk melanjutkan tempoh sah penyampaian BN (lihat perenggan 96–98).

(8) Walaupun A 45 k 5(3) Kaedah-Kaedah Mahkamah 2012 menetapkan bahawa perintah hendaklah mengandungi nama hakim, majistret, atau pendaftar yang membuatnya, A 45 k 5(1) memperuntukkan bentuk yang berbeza berkenaan dengan penghakiman, ada yang memperuntukkan nama Hakim untuk dinyatakan, bergantung kepada jenis perkara itu. Bentuk penghakiman yang terpakai di bawah A 42 k 5(a) Kaedah-Kaedah Mahkamah 2012 nampaknya adalah Borang 75(l), yang

terpakai kepada penghakiman yang dimasukkan menurut perintah mahkamah yang dibuat untuk penghakiman dimasukkan. Bentuk penghakiman yang ditetapkan ini tidak memerlukan nama hakim yang membuat perintah itu dinyatakan, sama seperti penghakiman yang dimasukkan sebagai ingkar kehadiran atau pembelaan. Oleh itu, adalah tidak dapat difahami bagaimana penghakiman boleh tidak konsisten dengan perintah mahkamah. Penghujahan bagi pihak JD dalam alasan rayuan ini adalah tanpa merit sama sekali. Ia adalah satu usaha yang sia-sia dan keterlaluan untuk mencari masalah dalam penghakiman yang dimasukkan oleh Mahkamah Tinggi menurut perintah itu, di mana tiada satu pun wujud (lihat perenggan 105–106 & 108–109).]

**Cases referred to**

*Ann Joo Steel Bhd v Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor and another appeal* [2020] 1 MLJ 689, FC (refd)

*Chai Meng Tut, Re; Ex p RHB Bank Bhd* [2014] MLJU 1947; [2015] 10 CLJ 721, HC (refd)

*Debtor (No 24 of 1935), Re* [1935] All ER Rep 744, CA (refd)

*Eon Bank Bhd, Per; Ex-Parte: Buang bin Haji Ahmad* [2008] MLJU 438; [2008] 1 LNS 339, HC (refd)

*Hong Leong Bank Bhd v Khairulnizam bin Jamaludin* [2016] 4 MLJ 302, FC (refd)

*J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd* [2000] 3 MLJ 177; [2000] 3 CLJ 104, SC (refd)

*Lembaga Kumpulan Wang Simpanan Pekerja v Edwin Cassian a/l Nagappan @ Marie* [2021] 5 MLJ 253; [2021] 7 CLJ 823, FC (refd)

*Liew Hon Kong v Bank Pertanian Malaysia Bhd* [2022] 1 MLJ 836, CA (refd)

*Lim Koon Chow v AmBank (M) Bhd* [2012] 8 MLJ 285, HC (refd)

*Low Ex Parte Gibson, Re* [1895] 1 QB 734, CA (refd)

*Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263, SC (refd)

*Ng Han Seng & Ors v Scotch Leasing Sdn Bhd (appointed receivers and managers)* [2003] 4 MLJ 647, CA (refd)

*Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014, HL (refd)

*Stock v Frank Jones (Tipton) Ltd* [1978] 1 All ER 948, HL (refd)

*Suruhanjaya Sekuriti v Datuk Ishak bin Ismail* [2016] 1 MLJ 733, FC (refd)

*Tetuan Kumar Jaspal Quah & Aishah v Far Legion Sdn Bhd & Ors* [2007] 3 MLJ 305, CA (refd)

*Transbay Ventures Sdn Bhd v Public Bank Bhd* [2006] MLJU 651; [2007] 7 CLJ 386, HC (refd)

**Legislation referred to**

Bankruptcy Rules 1969 (repealed by Insolvency Rules 2017)

Insolvency Act 1967 ss 2, 3(1)(i), (2)(ii), 5, 5(1), (3), (3)(a), (3)(b), (4), (5), (6), (7), 93(4)

Insolvency Rules 2017 rr 93, 94, 283

Rules of Court 2012 O 42 r 5(1), 5(3), O 56 r 1, Form 75(l)

*Henry Ling Kuong Meng (Ling & Wong) for the judgment debtor.*
*Lim Lip Sze (with Rachel Ho Wang Ying and Sophie Tan) (Reddi & Co) for the judgment creditor.*

**Wong Siong Tung J:**

INTRODUCTION AND BRIEF BACKGROUND

**[1]** This is another appeal (under encl 96) filed by Goh Kiang Ann, the judgment debtor ('JD'). In this instance, the JD appeals against the decision of the learned senior assistant registrar ('SAR') delivered on 8 August 2024. The SAR dismissed the JD's application, filed under summons in chambers dated 1 April 2024 (encl 46) which sought to set aside the bankruptcy notice issued on 24 August 2023 (encl 2), by OCBC Bank (M) Bhd, the judgment creditor ('JC').

**[2]** On 24 August 2023, the JC obtained the issuance of a bankruptcy notice ('BN') (encl 2) against the JD, based on a judgment dated 20 April 2022 (TMH4 of encl 50). The judgment was against the JD and two other defendants, who were guarantors for debts owed by Episo Enterprise Sdn Bhd ('Episo') under banking facilities provided by the JC.

**[3]** On 24 August 2023, the JC filed a summons in chambers (encl 3), seeking leave to commence bankruptcy action against the JD under s 5(3)(b) of the Insolvency Act 1967. This application was contested by the JD.

**[4]** In the meanwhile, the validity period for service of the BN was extended by the SAR by orders dated 9 November 2023 (encl 14), and 19 February 2024 (encl 35) to 13 May 2024 under r 94 of the Insolvency Rules 2017.

**[5]** On 18 March 2024, the SAR granted the JC's application, giving the JC leave to commence bankruptcy proceedings against the JD (encl 44).

**[6]** On 20 March 2024, the JD appealed the SAR's decision under O 56 r 1 of the Rules of Court 2012 (encl 42).

**[7]** Following that, on 22 March 2024, the JC served JD with the BN.

**[8]** The JD then filed an application by summons in chambers dated 1 April 2024 (encl 46) to set aside the BN. This application was dismissed by the SAR on 8 August 2024 (encl 99).

**[9]** Thus, this JD's appeal under O 56 r 1 of the Rules of Court 2012 (encl 96) against the SAR's refusal to set aside the BN.

**[10]** On 31 October 2024, this court allowed the JD's appeal (encl 42) against the learned SAR's decision to grant leave to commence bankruptcy action against the JD under s 5(3)(b) of the Insolvency Act 1967.

**[11]** Following that, the court also allowed the JD's appeal against the SAR's decision dated 8 August 2024, which dismissed the JD's application (encl 46) to set aside the bankruptcy notice ('BN').

**[12]** The following are the reasons for the court's decision to allow the appeal.

JD'S APPEAL (ENCL 96) AGAINST SENIOR ASSISTANT REGISTRAR'S REFUSAL TO SET ASIDE THE BN

**[13]** The grounds of the JD for set aside the BN served on him can be summarised as follows:

(a) the floating base lending rate ('BLR') used to calculate the interest in the BN is not in accordance with the terms of the judgment;

(b) the BN was improperly issued separately against the JD, despite the joint and several liabilities of the three guarantors;

(c) the BN was issued before the JC obtained leave from the court under s 5(3)(b) of the Insolvency Act 1967 to commenced bankruptcy action against the JD;

(d) the extension of time to serve the BN on the JD was granted without JC establishing special circumstances or good cause as required under r 283 of the Insolvency Rules 2017; and

(e) the judgment relied upon for issuing the BN lacks essential details, such as the identity of the judge and the process by which the decision was made and therefore defective.

WHETHER THE BANKRUPTCY NOTICE ('BN') IS VALID IF IT WAS ISSUED BEFORE THE JUDGMENT CREDITOR ('JC') OBTAINED LEAVE FROM THE COURT UNDER S 5(3)(b) OF THE INSOLVENCY ACT 1967

**[14]** The court will first address the JD's ground of appeal to set aside the bankruptcy notice ('BN') on the basis that the JC did not obtain leave under s 5(3)(b) of the Insolvency Act 1967 for its issuance.

**[15]** On this ground of the JD's appeal, since the court has decided that the JC has not exhausted all modes of execution and enforcement to recover debts owed by Episo, the principal debtor or borrower and given that the SAR's order granting leave to the JC has been set aside upon the JD's appeal (encl 42), the court must now consider whether the BN can legally stand or should be set aside, thereby allowing the JD's appeal on this ground alone.

**[16]** The key issue is whether, under s 5(3)(b) of the Insolvency Act 1967, a creditor must obtain the court's leave before issuing a bankruptcy notice against a guarantor (other than a social guarantor).

**[17]** This hinges on whether issuing a bankruptcy notice constitutes the commencement of 'bankruptcy action' under s 5 of the Insolvency Act 1967.

**[18]** In *Hong Leong Bank Bhd v Khairulnizam bin Jamaludin* [2016] 4 MLJ 302, the Federal Court decided that there is no requirement for a judgment creditor to obtained leave before the issuance of bankruptcy notice. As held by the Federal Court, the issuance of a bankruptcy notice is more administrative in nature and does not require prior leave from the court.

**[19]** The Federal Court held that a judgment creditor does not need to obtain leave of court before issuing a bankruptcy notice or presenting a creditor's petition against a social guarantor. Instead, the judgment creditor can satisfy the requirement to demonstrate that all reasonable avenues to recover the debt have been exhausted during the hearing of the creditor's petition by way of an affidavit.

See: paras 31 and 32 in *Hong Leong Bank Bhd v Khairulnizam bin Jamaludin*.

**[20]** However, the case of *Hong Leong Bank Bhd v Khairulnizam bin Jamaludin* was decided before the Bankruptcy (Amendment) Act 2017 (Act A1534), which came into force on 6 October 2017.

**[21]** Prior to the enactment of Act A1534, s 5 of the Bankruptcy Act 1967 reads as follows:

> 5 Conditions on which creditor may petition
>
> (1) ...
>
> (2) ...
>
> (3) A petitioning creditor *shall not be entitled to commence any bankruptcy action* against a social guarantor *unless he proves* to the satisfaction of the court that *he has exhausted all avenues to recover debts owed to him by the debtor*. (Emphasis added.)

**[22]** Section 4 of Act A1534 has renamed the 'Bankruptcy Act 1967' (the previous title) to the current 'Insolvency Act 1967'.

**[23]** Section 12(b) of Act A1534 replaced s 5(3) of previous Act with the current provisions under s 5(3)(a) and (b) of the Insolvency Act 1967 as follows:

> (3) A petitioning creditor *shall not be entitled to commence any bankruptcy action* —
>
> (a) against a social guarantor; and against a guarantor other than a social guarantor *unless the petitioning creditor has obtained leave from the court.* (Emphasis added.)

**[24]** The phrase 'unless he *proves* to the satisfaction of the court' that he has exhausted all avenues to recover debts owed to him by the debtor' has been amended by Act A1534 to read 'unless the petitioning creditor *has obtained leave* from the court'.

**[25]** It seems that this amendment introduced by Act A1534 signifies a significant change in procedure. Previously, creditors could prove their efforts to recover debts during the court hearing of the bankruptcy action, which would only occur after a bankruptcy petition had been presented as decided by the Federal Court in *Hong Leong Bank Bhd v Khairulnizam bin Jamaludin*.

**[26]** However, the new phrasing establishes that the creditor must now obtain leave from the court before commencing any bankruptcy action.

**[27]** This shift necessitates that creditors secure judicial permission in advance, changing the process from proving recovery efforts in the hearing of the bankruptcy action to requiring prior approval for commencement of the bankruptcy action.

**[28]** Section 12(c) of Act A1534 introduced new ss 5(4) to 5(7) in the Act under the new title, Insolvency Act 1967 currently in force, as follows:

> (4) *Before granting leave referred to in paragraph (3)(b)*, the court shall satisfy itself that the petitioning creditor has exhausted all modes of execution and enforcement to recover debts owed to him by the debtor.
>
> (5) Where the petition is presented *against a guarantor pursuant to subsection (4)*, a petitioning creditor shall state in his petition the particulars of his borrower.
>
> (6) For the purposes of subsection (4), modes of execution and enforcement include seizure and sale, judgment debtor summon, garnishment and bankruptcy or winding up proceedings against the borrower.
>
> (7) If the petitioning creditor fails to comply with the requirements of this section, the court shall dismiss the petition. (Emphasis added.)

**[29]** Prior to the enactment of Act A1534, s 2 of the Act under the previous title defines 'bankruptcy petition' as '*includes* a petition for a receiving order'.

**[30]** Section 2(b) of Act A1534 amended the definition of 'bankruptcy petition' under the Insolvency Act 1967, revising it to explicitly state that it '*means* a creditor's petition or a debtor's petition for bankruptcy'. This revised definition is now exhaustive, departing from the previous, broader interpretation, thereby limiting the scope to only these two specific types of bankruptcy petitions.

**[31]** In light of the amendments introduced by Act A1534, the question arises whether the term 'bankruptcy action' in s 5(3) of the Insolvency Act 1967 should be interpreted synonymously with the term 'bankruptcy petition' as now exhaustively defined in s 2 of the Act, thereby limiting it to only a creditor's petition or a debtor's petition for bankruptcy.

**[32]** However, if the Legislature intended for 'bankruptcy action' in s 5(3) to carry the same restricted meaning as 'bankruptcy petition' under s 2, it would have been straightforward and consistent for the Legislature to expressly replace the term 'bankruptcy action' with 'bankruptcy petition' in s 5(3) when introducing the amendments under Act A1534. Such a change would be consistent with the terminology in s 5(3) with the exhaustive definition provided in s 2, thereby eliminating any ambiguity.

**[33]** The Legislature, is not to be assumed in its drafting to produce ambiguity, confusion or inconsistency in its language.

**[34]** Statutory words and phrases must be interpreted according to their natural and ordinary meaning, without addition or subtraction, unless such an interpretation leads to absurdity, injustice, or contradiction, in which case they may be construed to avoid such outcomes.

See: *Suruhanjaya Sekuriti v Datuk Ishak bin Ismail* [2016] 1 MLJ 733 (FC); and *Stock v Frank Jones (Tipton) Ltd* [1978] 1 All ER 948 (HL)

**[35]** In cases of doubt, ambiguities has to be resolved in a manner consistent with the overall legislative purpose.

See: *Tetuan Kumar Jaspal Quah & Aishah v Far Legion Sdn Bhd & Ors* [2007] 3 MLJ 305; and *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 (HL).

**[36]** In this case, the purpose of introducing the amendments under Act

A1534, which replaced s 5(3) of the previous Act by s 12(b) of Act A1534, with the current provisions under s 5(3)(a) and (b) of the Insolvency Act 1967, indicates a clear legislative intention that leave must now be obtained prior to commencing a bankruptcy action.

**[37]** This represents a significant change in the law, departing from the position previously established by the Federal Court in *Hong Leong Bank Bhd v Khairulnizam bin Jamaludin*, where creditors were allowed to prove their efforts to recover debts during the hearing of the bankruptcy petition. The amendment reflects the Legislature's intention to alter the law in this regard; otherwise, there would have been no need to amend the existing statutory provisions.

**[38]** It appears that the Legislature's intention is also to provide enhanced safeguards for guarantors, ensuring they do not face the adverse consequences of bankruptcy before the creditor has exhausted all available modes of recovery against the principal debtor.

**[39]** By deliberately retaining the phrase 'bankruptcy action' in s 5(3), despite revising and defining 'bankruptcy petition' exhaustively in s 2, the Legislature appears to have intended 'bankruptcy action' to encompass a broader scope than merely a 'bankruptcy petition'. This distinction shows that the Legislature intends that 'bankruptcy action' is meant to include not only a creditor's petition or a debtor's petition for bankruptcy, but also other proceedings, steps, or actions connected to the broader bankruptcy process.

**[40]** The term 'action' itself ordinarily denotes a broader spectrum of legal steps.

**[41]** To interpret 'bankruptcy action' narrowly as synonymous with 'bankruptcy petition' in the light of the amendments introduced by Act A1534 would render the legislative choice and intent to retain the former term redundant or purposeless

**[42]** In *Liew Hon Kong v Bank Pertanian Malaysia Bhd* [2022] 1 MLJ 836, the respondent/judgment creditor issued a bankruptcy notice against the appellant/judgment debtor, a non-social guarantor, prior to the coming into force of Act A1534. The bankruptcy notice was subsequently served, and the act of bankruptcy occurred after Act A1534 came into force. Thereafter, the respondent/judgment creditor presented the creditor's petition against the appellant/judgment debtor (see para 27 of the reported judgment).

**[43]** The appellant/judgment debtor filed an application to set aside the creditor's petition on the ground of non-compliance with s 5(3) of the

Insolvency Act 1967 (as amended by Act A1534). The application was dismissed by the senior assistant registrar and later upheld by the High Court judge. On appeal, the Court of Appeal held that s 60 of Act A1534, a saving provision, preserved the vested rights of the respondent/judgment creditor under the Bankruptcy Act 1967 (prior to the amendments by Act A1534) and the Bankruptcy Rules 1969. As a result, the amended provisions of the Insolvency Act 1967 (as amended by Act A1534) and the Insolvency Rules 2017 were not applicable (see paras 77 to 83 of the reported judgment).

**[44]** The Court of Appeal further held that since the bankruptcy proceedings were governed by the Bankruptcy Act 1967 prior to its amendment by Act A1534, there was no requirement for the respondent/judgment creditor to obtain leave of court under s 5(3) of the amended Insolvency Act 1967. The court affirmed that it remained permissible for the respondent/judgment creditor to prove during the hearing of the creditor's petition that all avenues to recover the debts owed by the principal debtor had been exhausted, as established by the Federal Court in *Hong Leong Bank Bhd v Khairulnizam bin Jamaludin*. The respondent/judgment creditor had successfully satisfied this requirement under s 5(3) of the Bankruptcy Act 1967 prior to the coming into force of Act A1534.

**[45]** However, the Court of Appeal outlined the changes brought about by Act A1534 as follows (at paras 3 to 4):

> INSOLVENCY ACT 1967
>
> [3] On 21 November 2016, the new Bankruptcy (Amendment) Bill 2016 was passed as the Bankruptcy (Amendment) Act 2017 and received Royal Assent on 10 May 2017. By way of the *gazette* notification PU (B) 466/2017 dated 3 October 2017, the Bankruptcy (Amendment) Act 2017 came into force on 6 October 2017. Pursuant to the Bankruptcy (Amendment) Act 2017, the short title to the BA 1967 was changed to the Insolvency Act 1967 ('the IA 1967'). The Bankruptcy (Amendment) Act 2017 was mainly to strengthen the provisions relating to non-social guarantors and social guarantors and to raise the minimum debt threshold for the filing of a bankruptcy petition. Notwithstanding the changes brought about through such amendments, s 60 of the Bankruptcy (Amendment) Act 2017 preserved, among others, the proceedings, actions, or other matters required to be done under the BA 1967 which were still pending immediately before the IA 1967 came into operation, and those proceedings were to be continued under the BA 1967, as if the BA 1967 had not been amended. Further, in carrying into effect the objects of the IA 1967, the Insolvency Rules 2017 (PU(A)305/2017) were enacted pursuant to s 123 of the IA 1967 and came into force on 6 October 2017.
>
> [4] These amendments brought about important changes to the bankruptcy regime. Under the BA 1967, a judgment creditor could commence bankruptcy action against a 'social guarantor', only if he satisfied the court that he had exhausted all avenues to recover the debts owed to him by the principal debtor. *However, the IA*

*1967 absolutely prohibited bankruptcy proceedings against a social guarantor.*

[5] The BA 1967 defined 'social guarantor' as a person who provided, not for the purpose of making profit, the following guarantees:

(a) a guarantee for a loan, scholarship or grant for educational or research purposes;

(b) a guarantee for a hire-purchase transaction of a vehicle for personal or non-business use; and

(c) a guarantee for a housing loan transaction solely for personal dwelling.

[6] *Under s 5(3) of the IA 1967, the protection for non-social guarantors is that the judgment creditor must obtain leave of the insolvency court before commencing any bankruptcy action against the said non-social guarantor.* To obtain leave, the creditor must satisfy the court that he had exhausted all modes of execution and enforcement (including seizure and sale, judgment debtor summons, garnishment, bankruptcy or winding up proceedings) to recover the debts owed by the principal debtor. (Emphasis added.)

**[46]** The Court of Appeal formulated the issue for determination as follows:

[29] As mentioned earlier, the issue is whether the JC ought to have obtained leave of the insolvency court under s 5(3)(b) of the IA 1967 and in this regard, the JC having to satisfy the insolvency court (s 5(4) of the IA 1967) that the JC has exhausted all modes of execution and enforcement to recover the debts owed by the principal debtor, ie, MASB. It is not in dispute that the JC did not comply with s 5(3)(b) and s 5(4) of the IA 1967. The JC contends that the CP is regulated by the BA 1967 and not the IA 1967.

**[47]** In response to the appellant/judgment debtor's contention that the Insolvency Act 1967 (as amended by Act A1534) should apply — on the basis that the creditor's petition, which marked the commencement of the bankruptcy action, was only presented after Act A1534 came into force, whereas the issuance of the bankruptcy notice was merely administrative in nature as decided by the Federal Court in *Hong Leong Bank Bhd v Khairulnizam bin Jamaludin* — the Court of Appeal stated as follows:

[58] In this case the BN was filed on 20 September 2017 and registered as BC4238. The BN was issued pursuant to r 91 of the Bankruptcy Rules 1969 (now r 89 of the Insolvency Rules 2017) which provides:

(1) A bankruptcy notice *shall be issued by the Court in which a bankruptcy petition against the debtor may subsequently be filed [Form 5]*.

[59] Thus, BC4238 is the bankruptcy case number for the BN and subsequently for the CP as well. Hence, the BN and CP share the same bankruptcy case number.

[60] As mentioned earlier, the JD contends that the BN is merely the product of an administrative act on the part of the court. The JD relied on the passage from the

decision of the Federal Court in *Hong Leong Bank Bhd v Khairulnizam bin Jamaludin* [2016] 4 MLJ 302 at [32] where it was stated that the issuance of the BN per r 91 of the Bankruptcy Rules 1969 is more 'administrative' in nature. The other point that was made is that bankruptcy proceedings involves two stages, that is, the BN stage and the CP stage.

[61] *Whilst we accept that bankruptcy proceedings is a two staged process, we do not accept the argument that the BN was issued 'administratively' and therefore merely 'kickstarts' the process. In the case of Herry the employment appeal tribunal of the United Kingdom referred to the statutory notice as the 'precursor to the commencement of bankruptcy proceedings'. Counsel for the JD also referred to the case of Rees. We have examined both these cases. We do not see how they support the JD's contention that bankruptcy only commences upon the issuance of the CP.*

[62] In *Herry*, the EAT was dealing with the issue of the claimant's liability to pay costs in circumstances where the claimant had acted unreasonably in bringing and pursuing the proceedings. The EAT observed [16] that the 'service of a statutory demand is a precursor to the commencement of bankruptcy proceedings ...'. The EAT referred to ss 267 and 268 of the Insolvency Act 1986. But those sections do not say that the statutory demand is a precursor to the commencement of bankruptcy proceedings. The question for the EAT was in relation to the effect of bankruptcy on the award of costs that was made against the claimant.

[63] The EAT observed [19] that an award of costs against a bankruptcy in proceedings issued before his bankruptcy is a bankruptcy debt. We fail to see the relevance of Herry's case to the problem at hand.

[64] Next, as for the case of *Rees*, the facts which gave rise to the issue was as follows. The debtor had filed a 'debtor's petition'. Section 55 of the Bankruptcy Act 1908, states that the bankruptcy of a debtor shall commence at the time of filing of the petition.

[65] The debtor's petition was filed on 19 December 1922. Section 31 of the Bankruptcy Act 1908 states that the filing of such a petition shall be equivalent to an order adjudicating the debtor a bankrupt. Further, s 80 of the same statute states that a creditor of a debtor shall not retain the benefit of any execution of the goods or lands of the debtor or any debt which has been attached under the process of execution or attachment was completed before the 'date' of the adjudication and before notice of the filing of the bankruptcy petition against the debtor or the commission or any available act of bankruptcy by the debtor.

[66] What happened was that the bankrupt (Rees) was owed some monies by a debtor. One Atkins was a judgment creditor of the bankrupt. A few minutes before the filing of debtor's petition, the debtor of the bankrupt, in obedience to an attachment order made by the magistrate's court on the same day, paid the amount of the attached debt to Atkin, who was a judgment creditor of the bankrupt. The amount so paid was claimed by the official assignee under s 80 of the Bankruptcy Act 1908.

[67] The issue turned on whether the section referred to the 'day' of adjudication or 'time of adjudication'. The court held that the section referred to date (synonymous with day and not time). Thus, the official assignee was entitled to recover the same

from Atkin. Again, we are of the view that the case of *Rees* does not assist the JD in any way. There is no provision in the BA 1967 or the IA 1967 which states that bankruptcy proceedings are deemed to have commenced only upon the filing of the CP.

[68] *Rather, as was rightly submitted by counsel for the JC, the moment an application is made for the issuance of the BN, the jurisdiction of the bankruptcy court is invoked and the jurisdiction continues until the very end, ie, beyond the AO and RO. The jurisdiction of the bankruptcy court ceases when the AO and RO is set aside or the JD is granted a discharge.*

[69] *We agree with the submissions that were made by the JC's counsel, that an analogy may be made with the issuance of a writ. A writ is issued by the registry of the court and it is an administrative act. But even so, the fact that a writ has been issued is regarded as the commencement of legal proceedings. Why then should the issuance of the BN be any different? It is important to note that the issuance of the BN was done pursuant to the BA 1967 and the Bankruptcy Rules 1969. There is a statutory process which must be adhered to and the document which is issued has certain features and characteristics which carried with it, legal consequences. Upon the issuance of the writ, time stopped running for purposes of limitation.*

[70] And like a writ, the BN has a lifespan. Like a writ, the BN must be served during the period of its validity. Like a writ, a BN may be extended. And upon service of a writ, the defendant must enter appearance or else judgment in default may be entered. Like a writ, upon service of the BN, if the amount stated in the BN is not paid within seven days, then an act of bankruptcy is deemed to have occurred and the JC will have a period of six months to file the CP.

[71] *Next, in so far as the two staged process ie, BN followed by CP is concerned, this merely means that there are two steps to be taken. But they are nevertheless steps within a single legal proceeding, namely, as in this case, within BC4238.*

[72] It was contended that the CP is a nullity because of non-compliance with s 5(3) of the Insolvency Act 1967. However, the judge took the view that pursuant to s 60 of the Bankruptcy (Amendment) Act 2017, which is a saving provision, the bankruptcy proceeding, which was commenced under the BA 1967, shall continue to be governed by the BA 1967 and not the IA 1967.

[73] Clearly, prior to 6 October 2017, the JC had a right to commence bankruptcy against the JD and with the ability to file the BN and thereafter, the CP without any necessity for obtaining leave of the insolvency court which entailed proof of having exhausted all modes of execution against the borrower (MASB). In our view, this was a substantive right that had accrued to the JC. Thus, since the JC took the first step under the BA 1967 ie, by the issuance of the BN, the question is — whether the JC's rights under the BA 1967 and the Bankruptcy Rules 1969, have been completely abrogated under the IA 1967, or are they still extant and applicable? (Emphasis added.)

**[48]** It seems that the Court of Appeal has decided in essence that issuance of the bankruptcy notice marks the commencement of bankruptcy proceedings or action, countering the JD's contention in that case that bankruptcy

proceedings or action only begins with the CP. A

**[49]** With no disrespect to the decision of the Federal Court in *Hong Leong Bank Bhd v Khairulnizam bin Jamaludin*, in view of the amendments introduced by Act A1534, particularly to the definition of 'bankruptcy petition' as confined to only a creditor's petition or a debtor's petition for bankruptcy under s 2 of the Insolvency Act 1967, the phrase 'bankruptcy action' in s 5(3) of the Insolvency Act 1967 can no longer be construed synonymously with creditor petition. B

**[50]** Issuance of bankruptcy notice is a statutory demand which is a formal requirement that must be met before a bankruptcy petition can be filed. C

**[51]** It sets the stage for subsequent bankruptcy proceedings in the form of presentation of creditor petition against the debtor if the debtor fails to comply. D

**[52]** Upon service of the bankruptcy notice, the statutory provisions require the judgment debtor to take the necessary steps to dispute the demand, if they wish to do so, within the prescribed period. Failure to do so results in the judgment debtor being deemed to have committed an act of bankruptcy. E

**[53]** This, in turn, appears to allow any creditor of the judgment debtor (not necessarily the judgment creditor who issued the bankruptcy notice) to file a bankruptcy petition based on the act of bankruptcy committed by the debtor. F

See: s 3(2)(ii) of the Insolvency Act 1967 and r 93 of the Insolvency Rules 2017.

See also: s 5(1), particularly s 5(1)(c) of the Insolvency Act 1967 G

**[54]** In the premises, with the amendments introduced by Act A1534, this court is therefore of the view that issuance of the bankruptcy notice constitutes commencement of bankruptcy action and for the issuance of which against a debtor who is a guarantor (other than a social guarantor) under s 5(3) of the Insolvency Act 1967, prior leave of the court is required. H

**[55]** Having decided that the JC has not exhausted all modes of execution and enforcement to recover debts owed by Episo, the principal debtor or borrower and given that the SAR's order granting leave to the JC has been set aside by this court upon appeal by the JD in encl 42 and in the light of the court's decision, this court allows the JD's appeal under encl 96. I

**[56]** Lest this court is incorrect in its decision on the aforementioned issue,

it will also address the other grounds of appeal raised by the JD.

WHETHER THE BLR USED TO CALCULATE THE INTEREST IN THE BN IS NOT IN ACCORDANCE WITH THE TERMS OF THE JUDGMENT

**[57]** The learned counsel for the JD submitted, in summary, that the judgment specifies a fixed interest rate of 2.25%pa above the base lending rate ('BLR') of 5.76%pa, to be calculated from 1 July 2022 until full settlement. However, the BN demands interest at fluctuating rates above the prevailing BLR over different periods, which the JD contends is not authorized by the judgment.

**[58]** He further submitted that since the BN demands interest at varying rates (eg, 6.01%, 6.26%, 6.51%, and 6.76%pa), which deviates from the fixed rate specified in the judgment, there is non-compliance with s 3(1)(i) of the Insolvency Act 1967. This non-compliance with the judgment's terms, he contended, renders the BN fundamentally defective and invalid.

**[59]** In essence, the contention is that the BN is invalid because it demands interest rates not provided for or not in accordance with the fixed rate specified in the judgment, thereby violating the strict requirements of bankruptcy law, specifically s 3(1)(i) of the Insolvency Act 1967.

**[60]** The judgment dated 20 April 2023 orders the JD, as the third defendant, together with the first and second defendants, to jointly and severally pay the JC, as the plaintiff, the following sums, with prescribed interest, as set out below:

(a) RM17,802,031.36 as at 30th June 2022 with interest thereon at the rate of 2.25%pa *above the plaintiff's base lending rate of 5.76%*pa calculated on monthly rest and overdue interest of 1%pa above the interest rate applicable on a monthly basis and calculated from 1st July 2022 until the date of full settlement in respect of the TL1 facility under Account No 761–400862–7–00000;

(b) RM246,838.18 as at 30th June 2022 with interest thereon at the rate of 1.75%pa *above the plaintiff's base lending rate of 5.76%pa* calculated on monthly rest and overdue interest of 1%pa above the interest rate applicable on a monthly basis and calculated from 1st July 2022 until the date of full settlement in respect of the TL2 facility under Account No 761–401390–6–00000; and

(c) costs on a solicitor and client basis. (Emphasis added.)

**[61]** The BN (encl 2) issued requires the JD to pay to the JC the sum of

RM19,341,605 inclusive of interest thereon calculated up to the 24 August 2023 with particulars of interest as follows:

(a) interest at the rate of 2.25%pa above the creditor's *base lending rate of 5.76%pa* calculated on monthly rest and overdue interest of 1%pa above the interest rate applicable on a monthly basis and calculated *from 1 July 2022 until 12 July 2022* in the sum of RM52,746.31;

(b) interest at the rate of 2.25%pa above the creditor's *base lending rate of 6.01%pa* calculated on monthly rest and overdue interest of 1%pa above the interest rate applicable on a monthly basis and calculated *from 13 July 2022 until 13 September 2022* in the sum of RM286,608.58;

(c) interest at the rate of 2.25%pa above the creditor's *base lending rate of 6.26%pa* calculated on monthly rest and overdue interest of 1%pa above the interest rate applicable on a monthly basis and calculated *from 14 September 2022 until 8 November 2022* in the sum of RM265,050.96;

(d) interest at the rate of 2.25%pa above the creditor's *base lending rate of 6.51pa* calculated on monthly rest and overdue interest of 1%pa above the interest rate applicable on a monthly basis and calculated *from 9 November 2022 until 9 May 2023* in the sum of RM908,093.05; and

(e) interest at the rate of 2.25%pa above the creditor's *base lending rate of 6.76%pa* calculated on monthly rest and overdue interest of 1%pa above the interest rate applicable on a monthly basis and calculated *from 10 May 2023 until 24 August 2023* in the sum of RM562,216.02. (Emphasis added.)

Taking into account rental payment received from 1 July 2022 till 24 August 2023 in the sum of RM280,000 and payments received from the surrender value of the entrepreneur term life assurance policy in the sum of RM255,141.25, constituting the total amount of RM19,341,605.03 as demanded by the JC from the JD under the BN.

(ie RM17,802,031.36 + RM52,746.31 + RM286,608.58 + RM265,050.96 + RM908,093.05 + RM562,216.02 - RM280,000 - RM562,216.02 = RM19,341,605.03.)

**[62]** It is evident that while the judgment specifies an interest rate of 2.25%pa above the creditor's base lending rate, set at 5.76%pa, the BN issued by the JC claims the sum, including interest, based on a base lending rate higher than the specified 5.76%pa in the judgment.

**[63]** Section 3(1)(i) of the Insolvency Act 1967 requires that a bankruptcy

notice issued to the judgment debtor must demand payment of 'judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice'.

**[64]** In bankruptcy proceedings, strict construction of legislative provisions is applied to ensure clarity, precision, and adherence to statutory requirements. This serves to protect debtors from unjust bankruptcy declarations, upholds legal certainty, and ensures that the bankruptcy notice is clear and unambiguous, allowing the debtor to respond appropriately.

**[65]** Non-compliance with the legislative requirements for the bankruptcy notice goes to jurisdiction and also rendered the bankruptcy notice a nullity.

See: *Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263 (SC) at pp 265–266; and *J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd* [2000] 3 MLJ 177; [2000] 3 CLJ 104.

**[66]** While a judgment may allow for a fluctuating interest rate based on an ascertainable reference, such as the base lending rate set by Bank Negara, the key issue in this case, concerning the JD's appeal, is whether the judgment explicitly provides for the base lending rate to fluctuate.

See: Transbay Ventures Sdn Bhd v Public Bank Bhd [2006] MLJU 651; [2007] 7 CLJ 386.

**[67]** The term 'base lending rate' as used in the judgment is commonly understood to refer to a rate set by the Bank Negara that serves as a reference point for other lending rates of licensed financial institutions. The rate is not fixed but fluctuates as the Bank Negara adjusts its policy rates to manage economic conditions. Financial institutions, in turn, adjust their own lending rates in response to changes in the base lending rate, which reflects ongoing monetary policy decisions by Bank Negara.

**[68]** The reference to the 'base lending rate' in the judgment implies that the rate is not static. This term therefore, inherently signifies susceptibility to change over time as dictated by Bank Negara's policy decisions. Had the judgment intended a fixed rate, it would have explicitly stated a fixed interest rate (eg, 'fixed at 5.76%pa') instead of relying on a term that implies fluctuation, such as 'base lending rate'.

**[69]** Further, the judgment also provides that interest be 'calculated on monthly rest'. Monthly rest refers to a method of interest calculation where the rate is applied to the outstanding balance and recalculated monthly. Such

method of calculation as provided by the judgment further shows that the 'base lending rate' is not fixed.

**[70]** If the base lending rate were intended to remain static, the application of monthly rest would be incongruous, since this calculation method typically operates in conjunction with rates that are subject to adjustment.

**[71]** The requirement and practice of licenced financial institutions of adjusting lending rates in accordance with changes in the Bank Negara's policy rates, that is the 'base lending rate' is well-established.

**[72]** By the judgment, the court could not have intended to create a fixed rate by referencing the base lending rate. Rather, it reflects a fluctuating rate tied to the Bank Negara's policy, which can change over time.

**[73]** In summary, the judgment's use of and reference to the term 'base lending rate', in context, coupled with the monthly rest calculation method, demonstrates an intention for the rate to remain subject to periodic changes. This is consistent with the established understanding of the term and the operational practices of financial institutions.

**[74]** Therefore, the rate of 5.76%pa as specified in the judgment is not intended to be fixed. Instead, it represents the base lending rate as at 30 June 2022, with the sum of RM17,802,031.36 being calculated in anticipation of future fluctuations as may be required by the Bank Negara.

See: *Re Chai Meng Tut; Ex p RHB Bank Bhd* [2014] MLJU 1947; [2015] 10 CLJ 721; *Transbay Ventures Sdn Bhd v Public Bank Bhd* [2006] MLJU 651; [2007] 7 CLJ 386 and *Per: Eon Bank Bhd; Ex-Parte: Buang bin Haji Ahmad* [2008] MLJU 438; [2008] 1 LNS 339.

**[75]** For the reasons given, it cannot be said that the judgment sums demanded by the JC in the BN were not calculated in accordance with the terms of the judgment. Accordingly, there is no merit in the JD's appeal on this ground.

WHETHER THE BN WAS IMPROPERLY ISSUED SOLELY AGAINST THE JD, DESPITE THE JOINT AND SEVERAL LIABILITIES OF THE THREE GUARANTORS

**[76]** The JD takes issues on the fact that three separate bankruptcy notices have been issued demanding the full judgment sum from each guarantor including the JD, rather than issuing a single bankruptcy notice that named all

three guarantors or defendants, including the JD. It is contended that this is not in accordance with the terms of the judgment.

**[77]** The learned counsel for the JD submitted in effect, that by the issuance of three separate bankruptcy notices, the JC is claiming the same amount of the judgment sums, three times, totaling RM58,024,815.09, which exceeds the actual debt.

**[78]** The judgment in this case orders each of the guarantors (the first, second, and third defendants), including the JD as the third defendant, to jointly and severally pay the judgment sums.

**[79]** It means that two or more parties including the JD are collectively and individually liable to pay for the judgment sums. It allows the JC to act against all the debtors collectively, or any one debtor individually for the entire amount of the judgment sums adjudged against them.

**[80]** The JC has a flexibility of pursuing action to recover the entire judgment sums from any one or all of them.

**[81]** Under joint and several liability, while the JC can pursue against one or all of the guarantors (including the JD as the third defendant) under the judgment obtained, the JC cannot recover more than the total amount of the judgment sums. The recovery is strictly limited to the total amount of the judgment sums and owed.

See: *Lembaga Kumpulan Wang Simpanan Pekerja v Edwin Cassian a/l Nagappan @ Marie* [2021] 5 MLJ 253; [2021] 7 CLJ 823 (FC); *Lim Koon Chow v AmBank (M) Bhd* [2012] 8 MLJ 285 and *Re Debtor (No 24 of 1935)* [1935] All ER Rep 744 at p 746.

**[82]** However, in this case, there is no evidence or allegation that either of the other guarantors (the first and second defendants) has made any payment towards the judgment sums to the JC. Therefore, there can be no issue of double or triple recovery as contended by the learned counsel for the JD in his submission.

**[83]** As to the issuance of three bankruptcy notices, in *Re Low Ex Parte Gibson* [1895] 1 QB 734, it was held that where judgment has been recovered against several persons, even jointly, a bankruptcy notice may be issued against one of the joint-judgment debtors without including the others

**[84]** In light of the above, the JD is not required to procure the issuance of

the BN against all three guarantors (including the JD as the third defendant) collectively under the judgment.

**[85]** The JC is entitled to procure the issuance of the BN separately against each of them individually, though it cannot recover more than the total judgment sums collectively owed by all of them.

**[86]** The issuance of the BN separately against each of them individually does not mean that the JC is claiming the judgment sums due and owing three times as contended by the learned counsel for the JD.

See: *Lembaga Kumpulan Wang Simpanan Pekerja v Edwin Cassian a/l Nagappan @ Marie* [2021] 5 MLJ 253; [2021] 7 CLJ 823.

**[87]** Accordingly, this court holds that the JD's appeal on this ground cannot be sustained.

EXTENSION OF TIME TO SERVE THE BN ON THE JD WAS GRANTED BY THE SAR WITHOUT DEMONSTRATING SPECIAL CIRCUMSTANCES OR GOOD CAUSE AS REQUIRED UNDER R 283 OF THE INSOLVENCY RULES 2017

**[88]** The learned counsel for the JD submitted that the JC failed to provide a valid justification for the delay in serving the BN within the prescribed three month timeframe.

**[89]** He also submitted that extension of time was granted by the SAR without the JC providing special circumstances or good cause, which is required under r 283 of the Insolvency Rules 2017.

**[90]** However, a delay in serving the BN does not render it invalid. This court fails to see also, how an improper extension of time for the service of the BN could invalidate the BN that was issued.

**[91]** In substance, this grounds of appeal are directed against the orders dated 9 November 2023 (encl 14) and 19 February 2024 (encl 35) made by the SAR, where the SAR extended the validity period for service of the BN to 13 May 2024.

**[92]** Notably, there is no application to set aside these extension orders. This appeal does not pertain to any application challenging the extension orders made by the SAR. Instead, it concerns the JD's application to set aside the BN, which was dismissed by the SAR.

**[93]** The orders extending the validity period for the service of the BN, though made by the SAR, are binding court orders and remain valid until set aside.

**[94]** As long as these orders stand, it is not opened to the JD to argue that the JC failed to demonstrate before the SAR, special circumstances or good cause in their applications for an extension of time.

**[95]** The principles of law enunciated by the Court of Appeal in *Ng Han Seng & Ors v Scotch Leasing Sdn Bhd (appointed receivers and managers)* [2003] 4 MLJ 647 (CA) are applicable.

See also: *Ann Joo Steel Bhd v Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor and another appeal* [2020] 1 MLJ 689 (FC).

**[96]** It is not opened to the JD to challenge the validity of these orders in this appeal. Such a challenge amounts to a collateral attack on the validity of the court orders extending the time for service of the BN. The validity of these orders can only be challenged through proceedings specifically instituted for that purpose and not collaterally in this appeal.

**[97]** Additionally, s 93(4) of the Insolvency Act 1967, read together with r 283 and r 94 of the Insolvency Rules 2017, empowers the court with the discretion to extend the validity period for the service of the BN beyond the initial three months from the date of it's issuance.

**[98]** Considering the time involved in disposal of JC's application for leave to commence bankruptcy proceedings and in the JD's appeal against the SAR's decision in granting the leave, there were materials before the SAR to justify the exercise of discretionary power to extend the validity period for the service of the BN.

**[99]** For the reasons as given, the JD's appeal on this ground is also unsustainable.

THE CONTENTION OF DEFECTIVE JUDGMENT

**[100]** The learned counsel for the JD submitted that the judgment upon which the bn was issued is flawed as the judgment lacks information, such as the identity of the judge and the process by which the decision was made.

**[101]** He also submitted that there are inconsistencies between the

judgment (exh TMH3 of encl 50) and another order (exh TMH4 of encl 50), making the judgment not final.

**[102]** It is indisputable that, upon the JC's application as the plaintiff in High Court Suit No MYY-22NCC-1/7 of 2022, the learned judge of the Miri High Court struck out the defence of all three defendants, including the JD as the third defendant, and ordered that judgment be entered against all defendants, including the JD, with costs awarded to the JC.

**[103]** The sealed order dated 13 April 2022 (TMH3 of encl 50) clearly reflects these matters and includes the name of the learned High Court judge who made the order.

**[104]** The judgment dated 20 April 2022 (TMH4 of encl 50), upon which the BN was issued, explicitly states that the judgment was entered pursuant to the court order dated 13 April 2022 (TMH5 of encl 50). This judgment bears the seal of the Miri High Court and thus, authenticated by the SAR of the Miri High Court as the judgment of the said court.

**[105]** While O 45 r 5(3) of the Rules of Court 2012 stipulates that an order shall bear the name of the judge, magistrate, or registrar who made it, O 45 r 5(1) provides for different forms in respect of judgments, some provide for name of the judge to be stated, depending on the nature of the matter.

**[106]** The applicable form of judgment under O 42 r 5(1) of the Rules of Court 2012 appears to be Form 75(l), which applies to judgments entered pursuant to a court order made for judgment to be entered. Notably, this prescribed form of judgment does not require the name of the Judge who made the order to be stated, similar to judgments entered in default of appearance or defence.

**[107]** The JD does not dispute that the judgment dated 20 April 2022 was properly sealed and issued by the Miri High Court.

**[108]** It is therefore, incomprehensible how the judgment dated 20 April 2022 (TMH4 of encl 50) could be inconsistent with the court order dated 13 April 2022 (TMH5 of encl 50) as contended by the learned counsel for the JD.

**[109]** The contention on behalf of the JD in this ground of appeal is entirely without merit. It is a futile and excessive effort to search for problems in the judgment entered by the Miri High Court pursuant to the order, where none exist.

**[110]** In the premises, the JD's appeal on this ground cannot succeed.

PRONOUNCEMENT AND ORDER

**[111]** The JD has failed on all grounds of his appeal, except for the ground that prior leave of the court is required under s 5(3)(b) of the Insolvency Act 1967 for the issuance of the BN against the JD, which constitutes a bankruptcy action.

**[112]** For the reasons provided, and in light of this court's decision to allow the JD's appeal in encl 42 against the SAR's decision granting leave to the JC to commence bankruptcy action, this court therefore, allowed the JD's appeal under encl 96 solely on the basis that the JC did not obtain prior leave for the issuance of the BN.

**[113]** In the circumstances, this court made no order as to the costs of the JD's appeal.

*Appeal allowed.*

Reported by K Selvaraju